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PERWAJA STEEL SDN BHD v. RHB BANK BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE J
[ORIGINATING SUMMONS NO: WA-24NCC-679-12-2018]
18 JULY 2019

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COMPANY LAW: *Winding-up – Application by receiver and manager of wound-up company for directions by court – Banks provided facilities to company before company wound-up – Company issued medium term notes to various holders – Credit facilities and notes secured by, inter alia, charges over parcels of industrial land – Employees owed wages by company – Whether wages should be paid out from proceeds of any sale of charged lands, in priority over debenture holders – Whether receiver obliged to cause any part of sale proceeds of charged lands to be paid to any former employees of company if none of them was working on charged lands at time of sale by receiver – Whether maximum amount payable to any of former employees of company eligible or entitled to be paid shall be limited to wages for four consecutive months' work only – Whether such payment shall exclude termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance – Employment Act 1955, s. 31 – Companies Act 2016, ss. 384, 392 & 527*

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CIVIL PROCEDURE: *Directions – Application for – Application by receiver and manager of wound-up company – Banks provided facilities to company before company wound-up – Company issued medium term notes to various holders – Credit facilities and notes secured by, inter alia, charges over four parcels of industrial land – Employees owed wages by company – Whether wages should be paid out from proceeds of any sale of charged lands, in priority over debenture holders – Whether receiver obliged to cause any part of sale proceeds of charged lands to be paid to any former employees of company if none of them was working on charged lands at time of sale by receiver – Whether maximum amount payable to any former employees of company eligible or entitled to be paid shall be limited to wages for four consecutive months' work only – Whether such payment shall exclude termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance – Employment Act 1955, s. 31 – Companies Act 2016, ss. 384, 392 & 527*

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The first to fourth defendants were financial institutions that had provided the plaintiff, a wound-up company, with credit facilities. The plaintiff had also issued RM400,000,000 Murabahah medium term notes ('notes') to various holders. Equity Trust (M) Bhd ('the fifth defendant'), the trustee for the holders of these notes, held all securities provided to secure payment under these notes. The credit facilities and notes were secured by, *inter alia*, debentures executed by the plaintiff over its assets, each in favour of the first to fifth defendants ('debenture holders'), respectively, and charges over four

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parcels of industrial land ('charged lands') held by the plaintiff. By a security sharing agreement, the debenture holders agreed that the debentures and the land charges granted to each of them by the plaintiff shall rank *pari passu* and any proceeds from the sale of any of the securities taken shall be payable to the debenture holders rateably and *pari passu*. Prior to the plaintiff being wound-up, the plaintiff had ceased operations on the charged lands and had terminated the employment of its employees. According to the receiver, as at the date of it being wound up, the plaintiff was indebted to the debenture holders for a sum of RM1,193,638,176.45. After the plaintiff was wound-up, the receiver and manager of the plaintiff ('receiver') was appointed under the terms of the debentures. The receiver then took steps with the view of disposing, *inter alia*, the charged lands. Based on a valuation report obtained by the receiver, the market value of the charged lands was RM118,885,000 while the force sale value was RM83,198,500. Therefore, the total proceeds from any sale of the charged lands were not expected to satisfy the plaintiff's total debt owed to the debenture holders. The sixth to 790th defendants, the employees of the plaintiff ('employees'), submitted that (i) they were owed their wages by the plaintiff; (ii) their wages should be paid out from the proceeds of any sale of the charged lands, in priority over the debenture holders, by virtue of s. 31 of the Employment Act 1955 ('EA'). The receiver commenced the present application for directions, pursuant to s. 384 of the Companies Act 2016 ('CA'). The questions posed by the receiver were: (i) whether the receiver was obliged, under s. 31 of the EA, to cause any part of the sale proceeds of the charged lands to be paid to any of the former employees of the plaintiff if none of them was working on the charged lands at the time of their sale by the receiver ('first question'); and (ii) whether the maximum amount payable to any of the former employees of the plaintiff who were eligible or entitled to be paid from the sale proceeds of the charged lands, if any, shall be limited to wages for four consecutive months' work only and such payment shall exclude termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance ('second question').

The debenture holders contended that (i) on the first question, (a) where proceeds of sale received are insufficient to satisfy the secured creditors in a situation where s. 31(1) of the EA might have applied, and the issue of priority between the secured creditors and employees arises, the operative provision would be s. 527 of the CA, and not s. 31 of the EA; (b) if s. 527 of the CA applies, priority of payment would be such that wages of employees would rank second under s. 527(1)(b), but only as among unsecured creditors. Wages and salary would not have any priority over the claims of secured creditors; (c) to construe s. 31(1) of the EA as allowing wages to have priority of payment over secured creditors would result in a

conflict with s. 527(1) of the CA because s. 527(1) only affords priority for wages or salary over other unsecured debts; (d) s. 31(1) of the EA must be read subject to s. 392 of the CA, only to dismiss the applicability of the latter section after having done so; and (e) no time frame is given under s. 31(1) of the EA, which means, employees who have been terminated several years before the sale of the place of employment may still recover their unpaid wages if no 'cut-off' point is established. Such 'cut-off' would also place debenture holders in invidious positions of not knowing or being able to assess, the extent of their exposure and the amount that may be set against their securities in priority over the claims; and (ii) on the second question, s. 31(2) of the EA states, in no uncertain terms, that except for the second proviso, 'wages' includes the statutory payments. In other words, statutory payments are not included in the meaning of the term 'wages' found in the second proviso to s. 31(1) of the EA. Therefore, all that an employee would be entitled to, in priority under s. 31 is, under para. (a) to the second proviso, an amount not exceeding four consecutive months' work; excluding statutory payments. The employees, (i) on the first question, referred the court to the explanatory statement in the Bill that brought about the amendment to s. 31(1) of the EA to its present form; and (ii) on the second question, argued that (a) employees eligible under the substantive part of s. 31(1) would be entitled to priority of a maximum of four consecutive months of their 'wages' including statutory payments; (ii) if statutory payments are not included in the four consecutive months' 'wages', the legislative intent would be defeated.

Held (answering first question in affirmative and second question in negative):

(1) Neither s. 31 or the EA itself, nor any related section, indicate whether they apply to companies that have been wound up. In addition, neither does the word 'priority' appear in the substantive part of s. 31(1), save in the second proviso under para. (a). However, there exists s. 527 of the CA that caters for priority of payments, specifically in a winding-up. While the word 'priority' is not used in the substantive part of s. 31(1), its effect is clearly to provide for payment of wages in priority over payment to the debenture holders *qua* secured creditors. (para 28)

(2) The requirement under s. 31(1) of the EA that, '… the court or the receiver or manager shall not authorise payment of the proceeds of the sale, … , to the secured creditor or the debenture holder until the court or the receiver or manager shall have ascertained and caused to be paid, out of such proceeds or money, the wages of such employee ...' has precisely the effect of providing priority for wages, from the proceeds of sale, over the claims of the secured creditor. In addition, that priority of payment over secured creditors is intended may also be drawn from

para. (a), under the second proviso in s. 31(1) of the EA. This provision states that where the person liable is an employer, the total amount of wages of any employee, '… to which priority over the claim of a secured creditor is given by this section …' shall not exceed the amount due by the employer to the employee of wages for any four consecutive months' work. This too, makes it clear that s. 31(1) provides, and is intended to provide, priority to payment of wages over the debt of a secured creditor. Does it therefore follow that s. 31(1) of the EA is in conflict with s. 527(1) of the CA? *Prima facie*, it may be said that a conflict exists between these two provisions. However, the maxim *generalia specialibus non derogant* would apply. (paras 45-47)

(3) *Vis-a-vis* the CA, s. 31(1) of the EA is a specific statutory provision relating to priority of wages in very specific circumstances. Cardinal to its applicability is that it only applies 'to the sale of a place of employment' on which an employee to whom wages are due was employed or worked at, at the time when such wages were earned. In comparison, s. 527(1) of the CA caters generally for priority of payment in respect of 'all other unsecured debts' in a winding-up. The opening words of the section itself, 'Subject to this Act', is indicative that it is a general provision, even within the CA itself. Section 31 of the EA renders 'wages', as defined and in the specific circumstances of that provision, an exception to the general treatment of wages under s. 527 of the CA as having priority only among unsecured debts. (paras 49, 50 & 52)

(4) The employees referred the court to the explanatory statement in the Bill that brought about the amendment of s. 31(1) of the EA to its present form. The Bill was intituled an Act to amend the Employment Act and the Act was the Employment (Amendment) Act 2000 (Act A1085). Courts may have regard to explanatory statements in Bills to aid in the construction of a piece of legislation. The objective is to determine the intention of the Legislature or the legislative purpose, by the words used. Having regard to the explanatory statement, the objective intended by the legislature in amending s. 31 of the EA was manifest. The rights of employees, and in this case in respect of wages as defined, was to have priority over the rights of the secured creditor and debenture holder, once the property of the employer that falls within s. 31 has been sold. Consistently, s. 31(1) caters expressly for that priority, affording no qualification as to whether the prevailing circumstance had to be one in a winding-up of a company or otherwise. (paras 54, 57, 59 & 60)

(5) The interpretation of s. 31 of the EA, advanced by the debenture holders would lead to denying the rights of employees if the employer is wound-up. In this case, however, both a literal and purposive interpretation of s. 31(1) of the EA would lead harmoniously to achieving the intention of the Legislature to give priority to the rights of employees over secured creditors and that right ought not to be defeated by the general provisions to be found in s. 527 of the CA. (paras 61 & 62)

(6) The debenture holders contended that if at all s. 31(1) of the EA conferred any priority to payment of wages, it should be read subject to s. 392 of the CA such that priority may only be conferred if the company is not wound-up and only in respect of assets under a floating charge. If this contention is correct, it would follow that as the plaintiff was wound-up and the charged lands were not under a floating charge but were the subject of fixed charges, no priority may be afforded for the payment of wages under s. 31(1) of the EA. This contention may only be sustainable if indeed s. 31(1) of the EA is to be read subject to s. 392 of the CA. For the same reasons given why s. 31(1) of the EA is not subject to s. 527(1) of the CA, so too is s. 31(1) of the EA not subject to s. 392 of the CA. In addition, the very same reasons that it was contended no priority can exist under s. 392 in this case, *ie*, because the plaintiff was wound-up and the charges in this case were fixed charges, afforded a complete answer why s. 392 could not apply to the facts of this case or in respect of the first question, as posed. The debenture holders' contention was, in effect, to maintain that s. 31(1) of the EA must be read subject to s. 392 of the CA, only to dismiss the applicability of the latter section after having done so. The net result remained the same. Section 392 of the CA is not applicable in the circumstances of this case. (paras 65-69)

(7) On the charged lands was the plaintiff's factory. Therefore, the charged lands would have been a place of employment for the employees. The employees have all been terminated some years ago. Since the charged lands had not, as yet, been sold, none of the employees would be working in the charged lands at the time of their sale. Clearly, the express words in s. 31(1) of the EA do not make it a requirement that the employees must be working at the place of employment that is sold, at the time it was sold. Instead, what is in fact stated in 31(1) of the EA is that the section shall only apply to the sale of a place of employment on which any employee to whom wages are due as provided in s. 31(1), 'was employed or worked at the time when such wages were earned or such money accrued due ...' Thus, the emphasis or requirements are when and where the wages in question were earned rather than whether the employee was still working at the place of employment, at the time of its sale. (paras 25, 26, 82, 83 & 84)

(8) The wages that s. 31(1) of the EA is concerned with are wages that have already been earned by the employees and due to them from the employer. Their entitlement to payment had accrued. Having regard to the explanatory statement and the manifest intention of the Legislature, to read into s. 31(1) of the EA words that do not exist so as to delimit the recovery of such wages in priority over a secured creditor, would run counter to the very intention of the Legislature. Section 31(1) of the EA continues in the objective of the Act of catering for the interest of employees. While s. 31(1) may have a side effect undesirable to secured creditors, namely the inability to determine the extent of an employer's liability which would affect the value of the security, that is a matter that needs to be considered by the Legislature. The role of the court in the interpretation of a piece of legislation is to give effect to the intention of the legislature, having regard to what is set out in the legislation. (paras 91-93)

(9) The second question concerned the amount of 'wages' the employees were eligible to as provided under s. 31(1) of the EA and whether the term 'wages' for this purpose includes, 'termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance' which, for purposes of convenience shall collectively be referred to as 'statutory payments'. Paragraph (a) under the second proviso to s. 31(1) is not the provision that creates priority of payment of 'wages' over the claim of a secured creditor. The second proviso under para. (a) itself states, in respect of the 'wages' payable, as being 'wages', '… to which priority over the claim of a secured creditor is given by this section …'. This can only mean priority is conferred by s. 31, and priority is not limited only to the situation contemplated under para. (a) to the second proviso. In addition, no distinction is made in s. 31 between a situation where there are insufficient funds and a situation where there are sufficient funds, to meet the claim of the secured creditor and the 'wages' payable to the employees. In any event, requiring 'wages' 'to be ascertained and caused to be paid' before payment to the secured creditor may be authorised, as set out in the substantive part of s. 31(1), necessarily confers priority of payment over the claim of a secured creditor or debenture holder. Although there might appear to be an oddity or even an inconsistency, between the substantive part of s. 31(1) and the second proviso, such, in fact, is not the case. The substantive part of s. 31(1) precludes authorisation of payment of proceeds of sale to the secured creditor or debenture holder, until the 'wages' of employees eligible are ascertained and paid. This in effect, conferred priority for such 'wages' over the claim of the secured creditor. This priority is created by the substantive part of s. 31(1). (paras 96 & 110-112)

(10) Section 31(2) of the EA provides that except for the second proviso, the term 'wages' includes statutory payments. In other words, 'wages' in the substantive part of s. 31(1) includes statutory payments while 'wages' under the second proviso does not. No limit as to the amount of 'wages', which includes statutory payments, is imposed in the substantive part of s. 31(1). However, limits are imposed under the second proviso. Under para. (a) to the second proviso the total amount of 'wages', which is defined as excluding statutory payments, due by an employer to an employee that enjoys priority is not to exceed four consecutive months' work. The effect of the limit imposed under the second proviso on 'wages', defined as excluding statutory payments, is that statutory payments are not caught and not subject to the limit imposed under para. (a) of the second proviso to s. 31 of the EA. The resultant effect is that there is no limit to the amount of statutory payments payable under the substantive part of s. 31(1). The limit imposed under para. (a) in the second proviso to s. 31(1) operates only in respect of 'wages' for example, salary. Statutory payments payable are not subject to any limit imposed by para. (a) to the second proviso. By way of illustration, when making payment of 'wages' consisting of, for example, salary and statutory benefits under the substantive part of s. 31(1), a receiver will be required to pay salary not exceeding four months' work but there would be no limit on the statutory benefits payable as the limit imposed under para. (a) to the second proviso excludes and does not extend to statutory benefits. This outcome accords with the legislative intent disclosed in the explanatory statement in the Bill seeking to introduce s. 31(2), *ie,* extending priority granted in respect of wages to other statutory payments. (paras 113-118)

Case(s) referred to:

Ban Hin Lee Bank Bhd v. Applied Magnetics (M) Sdn Bhd (In Liquidation) [2003] 5 CLJ 1 HC ***(refd)***

Barat Estates Sdn Bhd & Anor v. Parawakan Subramanian & Ors [2000] 3 CLJ 625 CA ***(refd)***

Cheah Sin Choon v. Tan Lye Hock [2017] 1 LNS 1103 CA ***(refd)***

Director Of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd) (In Liquidation) [1995] 3 CLJ 316 SC ***(refd)***

Federal Commissioner Of Taxation & Anor v. Official Liquidator Of EO Farley Ltd (In Liquidation) & Anor (1940) 63 CLR 278 ***(refd)***

Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd [2019] 4 CLJ 131 FC ***(refd)***

Mary Colete John v. South East Asia Insurance Bhd [2010] 8 CLJ 129 FC ***(refd)***

Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS MD Zakariah [2018] 8 CLJ 273 FC ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Tan Sri Dato' Seri Vincent Tan Chee Yioun & Anor v. Jan De Nul (Malaysia) Sdn Bhd & Anor And Another Appeal [2019] 1 CLJ 19 FC ***(refd)***
Weng Neng Medical & Liquor (KL) Sdn Bhd v. Fountain Industries Sdn Bhd [1994] 3 CLJ 262 HC ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 213, 292(1)
Companies Act 2016, ss. 384, 392(1)(b), 527(1)(a), (b), (c), (d), (e), (f)
Employment Act 1955, ss. 2(1), 31(1), (2), 32
Government Proceedings Act 1956, s. 10(1)
Sales Tax Act 1972, s. 69(1)

For the plaintiff - Lau Kee Sern & Lim Pey Tsyr; M/s Kee Sern, Siu & Huey
For the 1st-5th defendants - Yoong Sin Min & Cheah Faan Jin; M/s Shook Lin & Bok
For the 6th-790th defendants - Alvin Tang Wye Keet & Tan Yang Qian; M/s Bodipalar Ponnudurai De Silva

Reported by Najib Tamby

JUDGMENT

Darryl Goon Siew Chye J:

[1] This was an application by the receiver and manager ("receiver") of the plaintiff, which is in liquidation, for directions pursuant to s. 384 of the Companies Act 2016 ("CA").

[2] Central to this case is the issue of whether the receiver is obliged to make payment of wages which may be owing by the plaintiff to the plaintiff's ex-employees, out of the proceeds from the sale of properties under securities created in favour of the first to the fifth defendants and if so, the extent of the obligation.

[3] In turn, central to this issue is s. 31 of the Employment Act 1955 ("EA") in respect of which, according to the receiver, there exists some dubiety as to the receiver's obligations. As such the receiver, in this application, sought the directions of the court by posing two questions.

[4] For the avoidance of any possible confusion, it needs to be pointed out that three questions were originally posed in the receiver's application (encl. 1). However, at the commencement of the hearing of encl. 1, by consent of the parties, the number of questions posed were reduced to two. There were also minor amendments to the two questions posed and which amendments were also effected by consent.

The Receiver's Questions

[5] The two questions posed by the receiver, as amended, were as follows:

(1) Whether the Receiver ("the Receiver") of the property of Perwaja Steel Sdn Bhd which is in liquidation is obliged under Section 31 of the Employment Act 1955 to cause any part of the sale proceeds of the lands of Perwaja Steel Sdn Bhd held under PN 2586 Lot No.

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1407, PN 2587 Lot No. 1412, PN 2588 Lot No. 1411 and PN 7747 Lot No. 2181 all situated in Mukim Teluk Kalung, District of Kemaman and State of Terengganu Darul Iman ("the Charged Lands") to be paid to any of the former employees of Perwaja Steel Sdn Bhd if none of them was working on the Charged Land at the time of sale thereof by the Receiver.

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["1st Question"]

(2) Whether the maximum amount payable to any of the former employees of the Perwaja Steel Sdn Bhd who are eligible or entitled to be paid from the sale proceeds of the Charged Lands (if any) shall be limited to wages for 4 consecutive months' work only and such payment shall exclude termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance.

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["2nd Question"]

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[6] Also made clear and agreed upon by the parties at the commencement of the hearing was that the court was not required to determine the merits or otherwise of the specific claims for wages by each of the sixth to the 790th defendants or the amount of wages due to each of them.

[7] Accordingly, the dispute of facts contained in the affidavit as to these E defendants' entitlement to be paid wages under s. 31 of the EA, or the amount they each may be entitled to, became of no significance in respect of the answers to the questions posed. Clearly, an originating summons would be ill-suited for determining heavily disputed facts. In any event, if necessary, the receiver may invoke s. 32 of the EA for an inquiry to be held F by the Director General of Labour to ascertain the amount due to any employee under s. 31.

Background

[8] The background facts to this application were not in dispute. They were set out with clarity in the receiver's affidavit.

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[9] The plaintiff was ordered to be wound-up on the 8 November 2017 by the High Court in Kuala Lumpur in Kuala Lumpur High Court Companies (Winding-Up) No: WA-28NCC-331-06-2017. The liquidators appointed were Yeoh Siew Ming (NRIC No: 671019-01-5518) and Lim Keng Peo (NRIC No: 750330-08-5899).

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[10] The first to the fourth defendants are financial institutions that had provided the plaintiff with credit facilities from time to time.

[11] The plaintiff had also issued RM400,000,000 of Murabahah medium term notes ("notes") to various holders. The fifth defendant (formerly Equity I Trust (Malaysia) Berhad) was the trustee for the holders of these notes and holds all securities provided to secure payment under these notes.

[12] The credit facilities and the notes are secured by, *inter alia*, debentures executed by the plaintiff over its assets, each in favour of the first to the fifth defendants respectively and charges over four parcels of industrial land held by the plaintiff under HSD 1474, PT 2504 (previously PN 7747 Lot No. 2181); PN 2586, Lot No. 1407; PN 2587, Lot No. 1412; PN 2588, Lot No. 1411; Mukim of Teluk Kalung, District of Kemaman in Terengganu Darul Iman. These lands shall hereinafter be referred to as the "charged lands" and, for ease of reference, the first to the fifth defendants shall collectively be referred to as the "debenture holders".

[13] By a security sharing agreement dated 1 June 2012, the debenture holders agreed that the debentures and the land charges granted to each of them by the plaintiff shall rank *pari passu* and any proceeds from the sale of any of the securities taken shall be payable to the debenture holders rateably, and *pari passu*.

[14] On 17 November 2014, prior to the plaintiff being wound-up, the plaintiff had ceased operations on the charged lands and had terminated the employment of its employees.

[15] According to the receiver as at the date of its being wound-up, ie, on 8 November 2017, the plaintiff was indebted to the debenture holders for a total sum of RM1,193,638,176.45.

[16] After the plaintiff was wound-up, on 24 January 2018, the receiver was appointed under the terms of the debentures. Pursuant to his appointment, the receiver took steps with the view to disposing, *inter alia,* the charged lands.

[17] Based on a valuation report dated 20 March 2018 obtained by the receiver, it was opined that the market value of the charged lands was RM118,885,000 while the force sale value would be RM83,198,500.

[18] Therefore, the total proceeds from any sale of the charged lands were not expected to satisfy the plaintiff's total debt owed to the debenture holders.

[19] The sixth to the 790th defendants claim to be former employees of the plaintiff. They maintained that they are owed of their wages by the plaintiff. They maintained that their wages should be paid out from the proceeds of any sale of the charged lands, in priority over the debenture holders by virtue of s. 31 of the EA. The sixth to the 790th defendants shall, for convenience and ease of reference, be referred to collectively as the "employee defendants".

[20] It was against this backdrop that the two questions were posed by the receiver. The disputants in this case were therefore, in effect, the debenture holders and the employee defendants – the reason for the dispute being that

the proceeds from the sale of the charged lands are not expected to be sufficient to satisfy the debt owing to the debenture holders, let alone both the total sum owing to the debenture holders and the wages claimed by the employee defendants. As at the date of the hearing of this application, the charged lands were still unsold.

[21] What was thus required of the court were the answers to the two general questions posed which would then be directions as to how the receiver should deal with the proceeds of sale of the charged lands, when realised.

[22] Section 31 of the Employment Act 1955 is central to the two questions posed and is therefore set out in full below for ease of reference:

Part VI
Priority Of Wages

Priority of wages over other debts

31. (1) Where by order of a court made upon the application of any person holding a mortgage, charge, lien or decree (hereinafter referred to as "the secured creditor") or in the exercise of rights under a debenture the property of any person (hereinafter referred to as "the person liable") liable under any of the provisions of this Act to pay the wages due to any employee or to pay money due to any contractor for labour is sold, or any money due to the person liable is attached or garnished, the court or the receiver or manager shall not authorize payment of the proceeds of the sale, or of the money so attached or garnished, to the secured creditor or the debenture holder until the court or the receiver or manager shall have ascertained and caused to be paid, out of such proceeds or money, the wages of such employee, or the money due to any contractor for labour under a contract between him and the person liable, which the person liable was liable to pay at the date of such sale, attachment or garnishment:

Provided that this section shall only apply to the sale of a place of employment on which.

(a) any employee to whom wages are due as aforesaid;

(b) any employee to whom wages are due by such contractor for labour as aforesaid;

(c) any contractor for labour to whom money is owed on account of the sub-contract by the contractor for labour as aforesaid, was employed or worked at the time when such wages were earned or such money accrued due, and to the proceeds of the sale of any products of such place of employment and of any movable property therein used in connection with such employment and to any money due to the person liable on account of work performed by such employee or contractor for labour or derived from the sale of the products of such work:

Provided further that -

(a) where the person liable is an employer the total amount of the wages of any employee to which priority over the claim of a secured creditor is given by this section shall not exceed the amount due by the employer to the employee as wages for any four consecutive months' work;

(b) where the person liable is a principal and where the wages are claimed from such principal under section 33 the total amount of the wages of any employees to which priority over the claim of a secured creditor is given by this section shall not exceed the amount due by the principal to the contractor at the date of the sale, attachment or garnishment unless the contractor is also a contractor for labour;

(c) where the person liable is a contractor or sub-contractor who owes money to a contractor for labour the total amount due to such contractor for labour to which priority over the claim of a secured creditor is given by this section shall not exceed the amount due by such contractor for labour to his employees (including any further contractors for labour under such first-mentioned contractor for labour) for any four consecutive months' work.

(2) In this section, except for the second proviso, "wages" includes termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance.

[23] Section 2(1) of the EA defines wages as follows:

"wages" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include.

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

(b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any traveling concession;

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus;.

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The First Question

[24] As for the first question, the arguments posed by the debenture holders turned on three issues, namely:

(i) whether s. 31 of the EA applies in respect of a company that has been wound-up;

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(ii) if not, is s. 31 of the EA applicable only to floating charges and

(iii) whether employees who are eligible to be paid under s. 31 of the EA had to be working on the charged lands as their "place of employment" at the time of sale of the charged lands by the receiver.

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[25] It is at this juncture appropriate to note that firstly, it was common ground that on the charged lands was the plaintiff's factory. Therefore, the charged lands would have been a "place of employment" for employees of the plaintiff.

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[26] Secondly, as indicated, it was also common ground that the plaintiff's employees have all been terminated some years ago. Since the charged lands have not, as yet, been sold, none of the employee defendants would therefore be working on the charged lands at the time of their sale.

[27] It was in the foregoing context that the first question was posed.

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[28] Neither s. 31 of the EA itself, nor any related section, indicates whether they apply to companies that have been wound-up. In addition, neither does the word "priority" appear in the substantive part of s. 31(1) save in the second proviso under para. (a). There, however, exists s. 527 of the Companies Act 2016 ("CA") that caters for priority of payments, specifically in a winding-up.

F

[29] Bearing this in mind, it was maintained on behalf of the debenture holders that where proceeds of sale received are insufficient to satisfy the secured creditors in a situation where s. 31(1) of the EA might have applied, and the issue of priority between the secured creditors and employees arises, the operative provision would be s. 527 of the CA and not s. 31 of the EA.

G

[30] If s. 527 of the CA applies as contended, it was argued that priority of payment would be such that wages of employees would rank second under s. 527(1)(b), but only as among unsecured creditors. Wages or salary would not have any priority over the claims of secured creditors.

H

[31] In support of this contention, learned counsel for the debenture holders relied heavily on the decision of the Supreme Court in *Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd) (In Liquidation)* [1995] 3 CLJ 316; [1995] 2 MLJ 600.

I

[32] In *Ler Cheng Chye* (*supra*) the company in question, Castwell Sdn Bhd ("Castwell"), went into voluntary liquidation. The assets of Castwell were insufficient to meet the claims of the Director of Customs for the Federal Territory ("customs") for sales tax owing, as well as the claims of the general and preferential creditors of Castwell, which included those of the MIDF debenture holders. The debenture holders, as secured creditors, disputed this contention and maintained that they had priority of payment.

[33] Customs advanced the argument that s. 69(1) of the Sales Tax Act 1972 ("STA") entitled its claim for sales tax to be ranked in priority over other claims. On this point, the Supreme Court held that s. 69(1) was merely directive in nature and did not provide for any priority. Section 69(1) of the STA reproduced by the Supreme Court in *Ler Cheng Chye* (*supra*) in p. 321 (CLJ); p. 605 (MLJ) of the report stated as follows:

> 69. (1) Where after the passing of this Act an effective resolution is passed or an order is made for the winding-up of a company which is a licensed manufacturer the liquidator of the company shall give notice thereof to the Director General within fourteen days thereafter, and *shall before disposing of any of the assets of the Company set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any sales tax that is or will thereafter become payable in respect of the company.* (emphasis added)

As can be seen, s. 69(1) of the STA that was being considered merely required that such sum out of the assets, as appears to the Director General to be sufficient to provide for any sales tax, be set aside.

[34] Quite apart from the express wording of s. 69(1) of the STA, the reasoning of their Lordships in *Ler Cheng Chye* (*supra*) was also reflected in and consistent with a judgment of the High Court of Australia in *Federal Commissioner of Taxation & Anor v. Official Liquidator of EO Farley Ltd (In Liquidation) & Anor* (1940) 63 CLR 278, where a legislation somewhat similarly worded as s. 69(1) was considered.

[35] Having dealt with s. 69(1) of the STA, the Supreme Court then had to deal with s. 10(1) of the Government Proceedings Act 1956, which provided as follows:

> Priority of Government debts
>
> 10(1) **All debts due and claims owing from time to time by any person to the Government**, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, **shall be entitled from the date of the accrual thereof**, respectively, **to a preference of payment over all debts or claims of every kind** which shall, subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever. (emphasis added)

[36] Set against s. 292(1) of the Companies Act 1965, which was the predecessor to and worded the same as s. 527(1) of the CA, a conflict was said to arise. Wan Yahya FCJ, delivering the judgment of the Supreme Court, stated at p. 324 (CLJ); p. 610 (MLJ) of the report that:

> Sales tax is a federal tax within the meaning of s 292(1)(f) of the Companies Act 1965 and being a tax due to the government it would likewise fall under the provision of s 10(1) of the Government Proceedings Act 1956. **Discernibly, there is a conflict between the Government Proceedings Act 1956 which conferred priority to the sales tax above all debts and the Companies Act 1965** which ranked such tax as the sixth in priority amongst unsecured debts. (emphasis added)

[37] This "discernible" conflict was resolved by the Supreme Court by invoking the maxim *generalia specialibus non derogant*. It was held that s. 10(1) of Government Proceedings Act 1956, "provides in non-specific and general terms that all debts due and claims owing to the Government shall enjoy preferential payments over other competing debts or claims which arise subsequent to the date of accrual of such Government claim". Sections 291 and 292 of the Companies Act 1965 were however, held to be, "special provisions dealing with a subject distinctive to companies". In the circumstances the Supreme Court stated, in p. 325 (CLJ); p. 610 (MLJ) of the report:

> *We have no hesitation in holding that s. 292(1) of the Companies Act 1965 is a special provision dealing with a particular subject, and that it is in a special provision dealing with particular subject, and that it is in conflict with s. 10(1) of the Government Proceedings Act 1956.* Nevertheless, we must also assume that the Legislature must have had in mind the latter Act when enacting the subsequent Companies Act 1965, and did not intend to abrogate it altogether. *The general rule of construction is such if having made the general Act the Legislature afterwards makes a special provision in conflict with the earlier legislation, the special provision so in conflict is treated as a mere exception to the general provision – Corp of Madras v. Electric Tramways Ltd* AIR 1931 Mad 152, ... (emphasis added)

[38] In conclusion, the Supreme Court stated at p. 325 (CLJ); p. 611 (MLJ) of the report that:

> We are therefore of the view that the maxim *specialia generalibus derogant* applies, and s. 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s. 10(1) of the Government Proceedings Act 1956 but otherwise the latter section prevails over other debts.

[39] This conclusion of the Supreme Court in *Ler Cheng Chye* (*supra*) was reinforced by, and also had the benefit of being consistent, with the provision in s. 213 of the Companies Act 1965, "which expressly binds the Government to the priorities of debts as provided in" the Companies Act 1965 itself. Section 213 of the Companies Act 1965 stated as follows:

> The provisions of this Part relating to the remedies against the property of a company, the priorities of debts and the effect of an arrangement with creditors shall bind the Government.

[40] By parity of reasoning, the debenture holders contended that s. 31(1) of the EA does not apply in relation to a company that is wound-up. Where a company is wound-up, priority of payment is governed by s. 527(1) of the CA because s. 31(1) of the EA does not cater for priority of payments as such. In this regard, it is also to be borne in mind that wages or salary are treated as an unsecured debt and only having priority over other unsecured debts as set out under s. 527(1)(a) to (f) of the CA. It also follows that as an unsecured debt, wages or salary would lose out in priority over secured debts such as those of the debenture holders.

[41] It was also maintained by the debenture holders that to construe s. 31(1) of the EA as allowing wages to have priority of payment over secured creditors would result in a conflict with s. 527(1) of the CA. This is because s. 527(1) only affords priority for wages or salary over other unsecured debts.

[42] Referring to the parliamentary debate of the Bill to amend s. 31 of the EA to its current form, learned counsel for the debenture holders pointed to the observations of two parliamentarians to the effect that the proposed amendments would conflict with s. 292 of the Companies Act 1965. However, it was suggested by the honourable Deputy Human Resources Minister then, that there was no substantial conflict while the honourable Deputy Speaker maintained that the rights of the employees were still intact and cannot be taken away. The debate however is of no particular assistance to the determination of whether there exists any conflict and if so, its resolution.

[43] The starting point is to determine whether it may be said that s. 31(1) of the EA does not provide for priority of payment.

[44] While the word "priority" is not used in the substantive part of s. 31(1) of the EA, its effect is clearly to provide for payment of wages in priority over payment to the debenture holders *qua* secured creditors.

[45] The requirement under s. 31(1) of the EA is that, "... the court or the receiver or manager **shall not authorise payment of the proceeds of the sale, …, to the secured creditor** or the debenture holder until the court or the receiver or manager shall have ascertained **and caused to be paid, out of such proceeds or money, the wages of such employee** ..." (emphasis added), has precisely the effect of providing priority for wages, from the proceeds of sale, over the claims of the secured creditor.

[46] In addition, that priority of payment over secured creditors is intended may also be drawn from para. (a), under the second proviso in s. 31(1) of the EA. This provision states that where the person liable is an employer, the total amount of wages of any employee, "... to which priority over the claim of a secured creditor is given by this section ..." shall not exceed the amount due by the employer to the employee of wages for any four consecutive months' work. This too, makes it clear that s. 31(1) provides, and is intended to provide, priority to payment of wages over the debt of a secured creditor.

[47] Does it therefore follow that s. 31(1) of the EA is in conflict with s. 527(1) of the CA? *Prima facie*, it may be said that a conflict exists between these two provisions. However, just as in *Ler Cheng Chye* (*supra*), the maxim *generalia specialibus non derogant* would apply.

[48] In *Ler Cheng Chye* (*supra*), s. 10(1) of the Government Proceedings Act 1956 was the general provision that gave way to the specific legislation pertaining to companies, in the especial situation of a winding-up.

[49] In this case, *vis a vis* the CA, s. 31(1) of the EA is a specific statutory provision relating to priority of wages in very specific circumstances. Cardinal to its applicability is that it only applies "to the sale of a place of employment" on which an employee to whom wages are due was employed or worked at, at the time when such wages were earned.

[50] In comparison, s. 527(1) of the CA caters generally for priority of payment in respect of "all other unsecured debts" in a winding-up. The opening words of the section itself, "Subject to this Act", is indicative that it is a general provision, even within the CA itself.

[51] Similarly, as Wan Yahya FCJ stated in *Ler Cheng Chye* (*supra*), at p. 324 (CLJ); p. 610 (MLJ):

> The relevant maxim in the present appeal is *generalia specialibus non derogant* – general statements or provisions do not derogate from special statements, or conversely, *specialia derogrant generalibus* – special provisions derogate from general.

[52] Section 31 of the EA renders "wages", as defined and in the specific circumstances of that provision, an exception to the general treatment of wages under s. 527 of the CA as having priority only among unsecured debts.

[53] To paraphrase Wan Yahya FCJ's statement in *Ler Cheng Chye* (*supra*), if having made the general provision in the CA, which existed as s. 292(1) of the Companies Act 1965, the legislature afterwards passed the special provision in s. 31(1) of the EA, which conflicted with the earlier legislation, the special provision so in conflict is treated as "a mere exception to the general provision".

[54] Learned counsel for the employee defendants referred the court to the explanatory statement in the Bill that brought about the amendment of s. 31(1) of the EA to its present form. The Bill was intituled to an Act to amend the Employment Act, and the Act was the Employment (Amendment) Act 2000 (Act A1085).

[55] For ease of reference, the relevant portion of s. 31(1) of the EA is reproduced below with the amendments indicated:

> 31(1) Where by order of a court made upon the application of any person holding a mortgage, charge, lien or decree (hereinafter referred to as "the secured creditor") **or in the exercise of rights under a debenture** the property of any person (hereinafter referred to as "the person liable") liable under any of the provisions of this Act to pay the wages due to any employee or to pay money due to any contractor for labour is sold, or any money due to the person liable is attached or garnished, the court or **the receiver of manager** shall not authorize payment of the proceeds of the sale, or of the money so attached or garnished, to **the secured creditor until the court the secured creditor or the debenture holder until the court or the receiver or manager** shall have ascertained and caused to be paid, out of such proceeds or money, the wages of such employee, or the money due to any contractor for labour under a contract between him and the person liable, which the person liable was liable to pay at the date of such sale, attachment or garnishment: (emphasis added)

[56] The explanatory statement in the Bill stated:

> 3. Clause 2 of the Bill seeks to amend section 31 of Act 265 to safeguard the rights of the employees. **The new provision ensures that the rights of the employees are given priority over the rights of the secured creditor and debenture holder once the property of the employer has been sold**, attached or garnished by the court, receiver or manager. (emphasis added)

[57] It is now well established that courts may have regard to explanatory statements in Bills to aid in the construction of a piece of legislation (see for example the decisions of the Federal Court in *Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd* [2019] 4 CLJ 131 and *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526, [2017] 3 MLJ 561). The objective is to determine the intention of the Legislature or the legislative purpose, by the words used.

[58] Zainun Ali FCJ stated in *Kempadang Bersatu Sdn Bhd* (*supra*) at p. 143 that:

> [34] *The courts have always been inclined to take a purposive and literal construction of a provision in a statute. In this regard, the literal meaning of an Act will be given where that meaning is in accordance with the legislative purpose* (see the decisions in *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441; [1991] 2 MLJ 42, *United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang* [1979] 1 LNS 122; [1979] 2 MLJ 121; *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35; *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449).

A [35] The same principle has been reiterated by the Federal Court recently, in the case of *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265; [2017] MLJU 260. Balia Yusof Wahi FCJ, held that:

> *The function of a court when construing an Act of Parliament is primarily*
B *to interpret the statute in order to ascertain what the legislative intent is.* And this is primarily done by reference to the words used in the provision. (emphasis added)

see also *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS MD Zakariah* [2018] 8 CLJ 273.

C **[59]** Having regard to the explanatory statement, the objective intended by the legislature in amending s. 31 of the EA was manifest. The rights of employees, and in this case in respect of wages as defined, was to have priority over the rights of the secured creditor and debenture holder, once the property of the employer that falls within s. 31 has been sold.

D **[60]** Consistently, s. 31(1) of the EA caters expressly for that priority, affording no qualification as to whether the prevailing circumstance had to be one in a winding up of a company or otherwise.

[61] The interpretation of s. 31 of the EA advanced by the debenture
E holders would lead to denying the rights of employees if the employer is wound-up.

[62] In this case however, both a literal and purposive interpretation of s. 31(1) of the EA would lead harmoniously to achieving the intention of the legislature to give priority to the rights of employees over secured creditors
F and that right ought not to be defeated by the general provisions to be found in s. 527 of the CA.

[63] As an adjunct to the foregoing argument, the debenture holders maintained that if s. 31(1) of the EA were to be applicable in the circumstances contemplated in the first question, it is only applicable in
G respect of floating charges. The charged lands in this case were the subject of fixed charges under the National Land Code.

[64] This argument was posited by reference to s. 392 of the CA, the material part of which provides as follows:

H **Payments of certain debts subject to floating charge in priority to claims under charge**

392(1) If a receiver or receiver and manager is appointed on behalf of the holders of any debentures of a company *secured by a floating charge or* possession is taken by or on behalf of debenture holders of any property comprised in *or subject to floating charge, then if the company is not wound up*
I *at the time, there shall be paid out of the assets coming into the hands of receiver or receiver and manager or other person taking possession in priority to the debenture holders the following*:

(a) firstly, ...

(b) secondly, all wages or salaries, including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, whether or not earned wholly or in part by way of commission, of any employee in respect of services rendered by him to the company for a period of four months before the date of the appointment of the receiver or receiver and manager up to an amount not exceeding fifteen thousand ringgit;

(c) thirdly, ... (emphasis added)

[65] The contention made was upon an underlying premise similar to that in respect of s. 527 of the CA, namely, that the provisions of the CA should apply over s. 31(1) of the EA. On this basis, it was contended that if at all s. 31(1) conferred any priority to payment of wages, it should be read subject to s. 392 of the CA such that priority may only be conferred if the company is not wound-up and only in respect of assets under a floating charge.

[66] If this contention be correct, it would follow that as the plaintiff is wound-up and the charged lands are not under a floating charge but are the subject of fixed charges, no priority may be afforded for the payment of wages under s. 31(1) of the EA, on the facts and in the circumstances of this case.

[67] This contention may only be sustainable if indeed s. 31(1) of the EA is to be read subject to s. 392 of the CA. For the same reasons given why s. 31(1) of the EA is not subject to s. 527(1) of the CA, so too is s. 31(1) of the EA not subject to s. 392 of the CA.

[68] In addition, the very same reasons that it was contended no priority can exist under s. 392 of the CA in this case, ie, because the plaintiff is wound-up and the charges in this case are fixed charges, afford a complete answer why s. 392 cannot apply to the facts of this case or in respect of the first question as posed.

[69] The debenture holders' contention here was in effect to maintain that s. 31(1) of the EA must be read subject to s. 392 of the CA, only to dismiss the applicability of the latter section after having done so. The net result remains the same. Section 392 of the CA is not applicable in the circumstances of this case.

[70] The remaining issue in the first question was whether the employees under s. 31(1) of the EA had to have been working on the charged lands "at the time of sale" of the charged lands by the receiver.

[71] In the factual circumstances of this case, such would never happen. As indicated, the employee defendants were terminated by the plaintiff even before the plaintiff was wound-up and before the appointment of the receiver. In addition, the charged lands have yet to be sold by the receiver.

[72] The first question posed was in the context of an assumption that the employees in question had worked on the place of employment that was charged when their wages claimed were earned, but they would not be working at such place of employment at the time when it is actually sold.

[73] It was contended on behalf of the debenture holders that it is imperative, for the purposes of s. 31(1) of the EA, that the employees must be working on the charged lands at the time the charged lands are sold. Because this can never happen in this case, the employee defendants' claims for their outstanding wages can never have priority.

[74] This requirement, it was contended, is the position stated in the case of *Weng Neng Medical & Liquor (KL) Sdn Bhd v. Fountain Industries Sdn Bhd* [1994] 3 CLJ 262; [1994] 3 MLJ 278; at pp. 264 to 265 (CLJ); pp 282 to 284 (MLJ) where James Foong J (as his Lordship then was) stated, in respect of a claim involving s. 31 of the EA:

> In respect of these conditions, I find that the employees have failed to satisfy the first. The appellants had made allegations that **no employees were working in the demised premises at the time of the auction** at the earliest possible stage of these proceedings. Though the five employees had every opportunity to deny this fact, it was not done.
>
> ...
>
> **The second question to be answered now is whether the employees were working at the demised premises when the auction took place.** On this, I find that the learned magistrate had failed to consider the absence of any evidence that these five employees were working at the demised premises at the material time. **There is no denial to the appellants' allegation that the respondents never employed any employees to work at the demised premises which was a warehouse.** When there is no such denial, then such contention can be considered as the truth. **This being the case, the employees have failed to qualify for priority payment under the proviso of s. 31 of the Act.** They are, therefore, not entitled to the proceeds of sale in priority to the appellants. (emphasis added)

[75] These statements seem to suggest that it is a requirement under s. 31(1) of the EA that the employees must have been working at the place of employment that was sold, at the time it was sold. This is merely a suggestion because the passage cited does not actually state that such was the requirement under s. 31(1). The finding of fact ultimately was that the employees in *Weng Neng Medical & Liquor (KL) Sdn Bhd* (*supra*) never worked at the place that was sold, which was a warehouse.

[76] What is to be noted is the fact that James Foong J did at the outset, set out what was said to be the requirement under s. 31 of the EA at p. 263 (CLJ); pp. 281 to p. 282 (MLJ) of the report:

> The part that was most vehemently opposed was the assertion by the employees that they were employed and working at the demised premises at the time the auction was carried out.
>
> This issue is material for the reason that **before s. 31 of the Act is applicable, the employees must be working at the place where the goods were auctioned off.** (emphasis added)

[77] Although somewhat pedantic, James Foong J did not specifically express the requirement under s. 31 of the EA to be such that the employees must actually be working at the place of employment, at the time the goods were auctioned.

[78] More importantly, if it was intended to be the *ratio decidendi* of the court's decision that the employees must have been working at the place of employment at the time of the auction, such was not obvious from the judgment in *Weng Neng Medical & Liquor (KL) Sdn Bhd* (*supra*). This specific issue as to whether the employees had to be working at the place of employment at the time of auction, was not analysed or discussed by his Lordship. In addition, it is also significant that the statement is necessarily *obiter dictum*. On the facts, it was found that no employees were employed to work at the place in question, which was a warehouse.

[79] The other case referred to was *Ban Hin Lee Bank Bhd v. Applied Magnetics (M) Sdn Bhd (In Liquidation)* [2003] 5 CLJ 1. The facts are of no particular relevance. However, in the course of his judgment, Tee Ah Sing J stated, at pp. 10 to 11 of the report that:

> **From the facts it is clear that on the said land is situated the factory building in which the employees of the company were employed.**
>
> The first proviso of s. 31(1) of the Employee Act 1955 reads as follows:
>
> > Provided that this section shall only apply to the sale of a place of employment on which:
> >
> > (a) any employee to whom wages are due as aforesaid,
>
> **So I am of the view that s. 31(1) of the Employment Act 1955 is applicable.**
>
> As there are competing claims between MBB and the employees of the company which is not covered by s. 236(2)(c) of the Companies Act 1965 as this section deals with sale by private treaty and not an order of sale by the court, in order to do justice I am of the view that resort should be had to invoke s. 31 of the Employment Act 1955.

A As such I hold that s. 31 of the Employment Act 1955 applies in respect of the sale by private treaty.

By virtue of s. 31(1) of the Employment Act 1955 the claims of the employees of the company ranks in priority to that of the claim by MBB. (emphasis added)

B **[80]** This statement appears not to require that the employees had to be working at the land in question at the time of the sale, for s. 31(1) of the EA to apply. However, if that was the intention, it was not said so. There was also no indication that the specific issue was addressed or considered by the court in *Applied Magnetics (M) Sdn Bhd (In Liquidation)* (*supra*). There was no C clear statement by the learned judge that the employees had either to be working at the place of employment at the time it was sold, or otherwise.

[81] In passing, it may be observed that in *Applied Magnetics (M) Sdn Bhd (In Liquidation)* (*supra)*, s. 31(1) of the EA was invoked and held applicable notwithstanding the fact that the company in question was in liquidation. D Admittedly, the contention that s. 31 of the EA does not apply when the company in question is in liquidation put forward in the current case, did not appear to have been addressed or put in issue before the Court in *Applied Magnetics (M) Sdn Bhd (In Liquidation)* (*supra*).

E **[82]** Clearly, the express words in s. 31(1) of the EA do not make it a requirement that the employees must be working at the place of employment that is sold, at the time it was sold.

[83] Instead, what is in fact stated in s. 31(1) of the EA is that the section shall only apply to the sale of a place of employment on which any employee F to whom wages are due as provided in s. 31(1) of the EA, "**was employed or worked at the time when such wages were earned or such money accrued due** ...". (emphasis added).

[84] Thus, the emphasis or requirements are when and where the wages in question were earned rather than whether the employee was still working at G the place of employment, at the time of its sale.

[85] Learned counsel for the debenture holders emphasised that no time frame is given under s. 31(1). This would mean that employees who have been terminated several years before the sale of the place of employment may still recover their unpaid wages if no "cut-off" point is established. Such H would also place debenture holders in the invidious position of not knowing, or being able to assess, the extent of their exposure and the amount that may be set against their securities in priority over their own claims.

[86] For these reasons, it was contended that there should be a cut-off point and that point should logically be the time the place of employment is sold I such that only employees who were working there at that point in time may have priority for their unpaid wages.

[87] It was suggested that imposing a cut-off point would be consistent with s. 392(1)(b) of the CA. However, upon closer analysis, what is provided in s. 392(1)(b) was the extent of the wages recoverable, rather than a cut-off point for the payment of wages that are eligible to priority.

[88] This contention of the debenture holders however, calls for the insertion of words into s. 31(1) of the EA that does not exist and is neither warranted nor necessary. The situation justifies reiterating the observation of Heliliah Mohd Yusof FCJ in delivering the judgment of the Federal Court in *Mary Colete John v. South East Asia Insurance Bhd* [2010] 8 CLJ 129 at p. 157:

> [43] *Both questions in effect invite this court to import words that are not there and to freely interpret the law to accord to a certain view favorable to the appellant.* It justifies the reminder made in *Ulster-Swift Ltd v. Taunton Meat Haulage Ltd* [1977] 1 WLR 625 where Megaw LJ said:
>
> > *[The danger of such latitude] is not, indeed, that the judges become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation.* Hence the law, whatever it may gain in other respects, may in some cases suffer a loss in what has always been regarded as one of the essential features of law-uniformity; or at least predictability. Sometimes, in relation to the judicial view of "the presumed purpose of the legislation", it may be a case of *quot judices*, *tot sententiae*: whereas in relation to what the legislation has actually said, it is unlikely that judicial opinion would vary so widely. *Furthermore, there is no legal necessity for any such cut-off point to be read into section 31(1). Section 31(1) is perfectly workable as it stands without any such cut-off point and there is no consequential absurdity without one.* (emphasis added)

[89] Similarly, in the recent decision of the Court of Appeal in *Cheah Sin Choon v. Tan Lye Hock* [2017] 1 LNS 1103 at para. 37, Nallini Pathmanathan JCA (as Her Ladyship then was) observed referring to an Indian case:

> [37] In the Indian case of *Secretary to Government, Punjab v. Jagar Singh* [1977] Rev LR 104, AIR 1977 P H 114, the learned judge D.S. Lamba J stated at para 12:
>
> > **It is well settled that in interpreting a statute, it is not competent for a Court to add words to a statute nor to subtract any word from it.** The Court must place due meaning upon every word thereof without straining the language in any way. The plain duty of the Court is to gather the intention of the Legislature from the words used in the statute. The Courts can depart from this rule only in rare and exceptional cases where the plain meaning of the words used would lead to absurd conclusions or would be destructive of the very purpose for which the Legislation sought to be interpreted happens to be enacted. (emphasis added)

[90] In *Tan Sri Dato' Seri Vincent Tan Chee Yioun & Anor v. Jan De Nul (Malaysia) Sdn Bhd & Anor and Another Appeal* [2019] 1 CLJ 19 at p. 37, Azahar Mohamed FCJ delivering the judgment of the Federal Court stated clearly that:

> [50] ... An important statutory interpretation that is applicable here is that court cannot read or add words into a statute (see *Husli Mok v. Superintendent of Lands and Surveys & Anor* [2014] 9 CLJ 733; [2014] 6 MLJ 766). As judges, we are **not entitled to read words into a statute unless clear reason for it is to be found in the statute itself** (see *Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2017] 3 CLJ 257; [2016] 5 MLJ 141). (emphasis added)

[91] It must be borne in mind that the wages that s. 31(1) of the EA is concerned with are wages that have already been earned by the employees and due to them from the employer. Their entitlement to payment had accrued. Having regard to the explanatory statement referred to above and the manifest intention of the Legislature, to read into s. 31(1) of the EA words that do not exist so as to delimit the recovery of such wages in priority over a secured creditor, would run counter to the very intention of the legislature.

[92] In addition, it must not be overlooked that the EA is a piece of "beneficent social legislation". As observed by Gopal Sri Ram JCA (as His Lordship then was) in *Barat Estates Sdn Bhd & Anor v. Parawakan Subramanian & Ors* [2000] 3 CLJ 625; [2000] 4 MLJ 107, at p. 634 (CLJ); p. 115 (MLJ), when referring to the Employment Act 1955:

> The scheme of the Act thus when viewed as a whole, is to afford protection to persons employed under a contract of service. Hence, the Act is designed to afford a degree of security of tenure that is not available to a servant at common law. *It is therefore plain that the Act is a piece of beneficent social legislation. As such, its provisions must, in accordance with well-settled principles, receive a broad and liberal interpretation that enhances its avowed object.* It is what Lord Simon in *Stock v. Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 236 referred to as the 'functional construction of a statute'.
>
> In *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p 368, the Federal Court when considering another piece of beneficent social legislation, namely, the Industrial Relations Act 1967, applied the dictum of Bhagwati J in *Workmen of Indian Standards Institution v. Management of Indian Standards Institution* [1976] 1 LLJ 36 at p 43:
>
> > [I]t is necessary to remember that the Industrial Disputes Act 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry' so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so

> applied as to give the widest possible connotation to the term 'industry'. Whenever a question arises whether a particular concern is an 'industry', *the approach must be broad and liberal and not rigid or doctrinaire. We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it* in the achievement to (*sic*) its avowed social objective. (emphasis added)
>
> *We are of the view that the approach that commended itself to the Federal Court on that occasion should apply in the instant case when interpreting the provisions of the Act.* (emphasis added)

[93] Section 31(1) of the EA continues in the objective of the Act of catering for the interest of employees. While s. 31(1) may have a side effect undesirable to secured creditors, namely the inability to determine the extent of an employer's liability which would affect the value of the security, that is a matter that perhaps needs to be considered by the Legislature. The role of the court in the interpretation of a piece of legislation is to give effect to the intention of the legislature, having regard to what is set out in the legislation.

[94] For the reasons given above, the answer to the first question posed by the receiver is in the affirmative.

The Second Question

[95] As the first question is answered in the affirmative, the second question will now need to be considered.

[96] The second question concerns the amount of "wages" the employees are eligible to as provided under s. 31(1) of the EA and whether the term "wages" for this purpose includes, "termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance" which, for purposes of convenience shall collectively be referred to as "statutory payments".

[97] Learned counsel for the debenture holders contended that the answer to the second question posed is quite obvious having regard to the express words in s. 31(2) of the EA. Subsection (2) to s. 31, as formulated, states in no uncertain terms that except for the second proviso, "wages" includes the statutory payments. Putting it the other way around, this means statutory payments are not included in the meaning of the term "wages" found in the second proviso to s. 31(1). Therefore, all that an employee would be entitled to in priority under s. 31 is, under para. (a) to the second proviso, an amount not exceeding four consecutive months' work – excluding statutory payments.

[98] The provision that is relevant to the second question is para. (a) under the second proviso in s. 31(1). Under this provision, where the person liable is the employer, the amount of the "wages" that would have priority over the claim of a secured creditor under s. 31 is limited to four consecutive months' work. "Wages" for the purposes of this second proviso does not include statutory payments and this is because s. 31(2) says so.

[99] Therefore, it was the debenture holders' contention that employees who are eligible to have their wages paid in priority over the claim of a secured creditor would be entitled only to an amount not exceeding four consecutive months of their "wages", excluding statutory payments.

[100] Learned counsel for the employee defendants was however of a different view. It was contended that the employees eligible under the substantive part of s. 31(1) of the EA would be entitled to priority of a maximum of four consecutive months of their "wages", including statutory payments.

[101] It was contended for the employee defendants that otherwise, if statutory payments are not included in the four consecutive months "wages", the legislative intent would be defeated.

[102] In support of this contention, reference was made to the explanatory statements in the Bill which sought to amend the EA and which amendments were brought about by the Employment (Amendment) Act 1998 (Act A1026).

[103] As for the insertion of this sub-s. (2), namely s. 31(2) of the EA, the explanatory statement in the Bill stated as follows:

> 12. Clause 11 seeks to amend section 31 by **extending the priority of payment granted in respect of the wages of an employee** to that of the debts of a secured creditor of an employer, **to other statutory payments due to an employee** under the Act. The statutory payments include termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance. (emphasis added)

[104] *Ex facie*, it would seem odd that the payment of "wages" that a receiver is required to make under the substantive part of s. 31(1) is different from the maximum "wages" that the employees would be entitled to under para. (a) to the second proviso in s. 31(1).

[105] Learned counsel for the debenture holders submitted that the fact that the statutory payments are to be excluded from the meaning of "wages" under the second proviso is expressly stated in s. 31(2). The wording is plain and clear and the consequences unavoidable.

[106] In addition, it was contended that there is in fact no conflict between or oddity in the difference of the meaning given to "wages" in the substantive part of s. 31(1) and under the second proviso.

[107] This difference in definition it was contended, is because no "priority" of payment is contemplated in the payment of the wages referred to in the substantive part of s. 31(1). "Priority" is only brought into issue under the second proviso.

[108] This distinction means, it was contended, that if there are sufficient funds, no issue of priority arises and payment would be in respect of "wages" which would include the statutory payments. If, however, there are insufficient funds, then priority would be in issue and this will then be regulated by para. (a) under the second proviso to s. 31(1). In such a situation, due to insufficiency of funds, priority would be given to the payment of "wages" with a narrower definition ie, excluding statutory payments, subject to a maximum amount.

[109] The contention by learned counsel for the debenture holders seems attractive. However, para. (a) under the second proviso to s. 31(1) is not the provision that creates priority of payment of "wages" over the claim of a secured creditor. As stated above, the second proviso under para. (a) itself states, in respect of the "wages" payable, as being "wages", "... to which priority over the claim of a secured creditor is given **by this section** ...". (emphasis added). This can only mean priority is conferred by s. 31, and priority is not limited only to the situation contemplated under para. (a) to the second proviso. In addition, no distinction is made in s. 31 between a situation where there are insufficient funds and a situation where there are sufficient funds, to meet the claim of the secured creditor and the "wages" payable to the employees.

[110] In any event, as indicated above, requiring "wages" "to be ascertained and caused to be paid before payment to the secured creditor may be authorised, as set out in the substantive part of s. 31(1), necessarily confers priority of payment over the claim of a secured creditor or debenture holder.

[111] In the court's view, although there might appear to be an oddity or even an inconsistency, between the substantive part of s. 31(1) and the second proviso, such, in fact, is not the case.

[112] The substantive part of s. 31(1) precludes authorisation of payment of proceeds of sale to the secured creditor or debenture holder, until the "wages" of employees eligible thereunder are ascertained and paid. As mentioned above, this in effect, confers priority for such "wages" over the claim of the secured creditor. This priority is created by the substantive part of s. 31(1).

[113] Section 31(2) provides that except for the second proviso, the term "wages" includes the statutory payments. In other words, "wages" in the substantive part of s. 31(1) includes statutory payments while "wages" under the second proviso does not.

[114] No limit as to the amount of "wages", which includes statutory payments, is imposed in the substantive part of s. 31(1). However, limits are imposed under the second proviso. Under para. (a) to the second proviso the total amount of "wages", which is defined as excluding statutory payments, due by an employer to an employee that enjoys priority is not to exceed four consecutive months' work.

[115] The effect of the limit imposed under the second proviso on "wages", defined as excluding statutory payments, is that statutory payments are not caught and not subject to the limit imposed under para. (a) of the second proviso to s. 31 of the EA.

[116] The resultant effect is that there is no limit to the amount of statutory payments payable under the substantive part of s. 31(1). The limit imposed under para. (a) in the second proviso to s. 31(1) operates only in respect of "wages" for example, salary. Statutory payments payable are not subject to any limit imposed by para. (a) to the second proviso.

[117] By way of illustration, when making payment of "wages" consisting of, for example, salary and statutory benefits under the substantive part of s. 31(1), a receiver will be required to pay salary not exceeding four months' work but there would be no limit on the statutory benefits payable as the limit imposed under para. (a) to the second proviso excludes and does not extend to statutory benefits.

[118] This outcome accords with the legislative intent disclosed in the explanatory statement in the Bill seeking to introduce s. 31(2), ie, extending priority granted in respect of wages to other statutory payments.

[119] Therefore, the answer to the second question posed is in the negative.

Conclusion

[120] In conclusion and in summary, the answer to the first question posed by the receiver is in the affirmative and the answer to the second question posed by the receiver is in the negative.

[121] Having heard submissions by counsel, costs is awarded to the sixth to the 790th defendant in the sum of RM15,000 to be paid out of the assets of the plaintiff charged to the first to the fifth defendants.